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No. 407

# In the Supreme Court of the United States

OCTOBER TERM, 1964

H. L. HANCHEY, WARDEN,
LOUISIANA STATE PENITENTIARY,
ANGOLA, LOUISIANA,

*Petitioner,*

v.

WOODMAN J. COLLINS,

*Respondent.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

JACK P. F. GREMILLION,
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THOMAS W. McFERRIN,
Special Counsel.

JAMES E. PHILLIPS, JR.,
Special Counsel,
Of Counsel.

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## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

The petition for a writ of certiorari in this case was filed on August 19, 1964. On September 18, 1964, the United States Court of Military Appeals rendered its decision in *United States v. Crawford.* The opinion of the Court is reported in 15 USCMA at page 31. (Vol. 15 No. 3 Advance Opinions, October 5, 1964). One of the questions before the Court in *Crawford* was whether the deliberate inclusion of a Negro as a member of the Court convened to hear that particular case entitled the Negro defendant to a new trial. In denying Crawford a new trial the Court refused to follow the majority opinion of the Fifth Circuit Court of Appeals in this case. In this respect Chief

Justice Quinn as organ for the majority said at pages 40-41:

> "We turn to the intentional selection of a Negro to serve as a court member. Complaints about color or race in the selection of jurors normally deal with the *exclusion* of qualified persons solely on such irrelevant and prohibited bases. See Annotation, "Violation of constitutional rights of defendant in criminal case by unfair practices in selection of grand or petit jury," 82 L ed 1053. However, in *Collins v. Walker*, 329 F2d 100 (1964), the Court of Appeals for the Fifth Circuit granted a writ of *habeas corpus* on the ground the accused, a Negro, was unlawfully discriminated against when the panel of twenty grand jurors which indicted him was so organized as deliberately to *include* six Negroes. The court reasoned that the intentional inclusion of Negroes constituted "discrimination against . . . [the accused] because of his race or color." *Id.*, at page 105. With due respect to the learning and experience of the Court of Appeals, we think it misapprehended the fundamental difference between inclusion of a member of a particular group for the purpose of obtaining a fair representation of a substantial part of the community, and exclusion of members of that group so as to reduce the representational character of the jury. In *Avery v. Georgia*, 345 US 559, 562, 97 L ed 1244, 73 S Ct 891 (1953), which was relied upon by the Court of Appeals, the Supreme Court criticized the practice of using a white ticket to designate a prospective white juror, and a yellow ticket to indicate a Negro juror. However, the criticism was related to the established fact that no Negroes had been selected

for service over an extended period of time, although they numbered five percent of the jury list. The flagging of the tickets, together with the long continued failure to select a single Negro for service, was held to establish a *prima facie* case of *exclusion* of Negroes from jury duty. It was exclusion, not inclusion, that vitiated the selection process. In *Dow v. Carnegie-Illinois Steel Corporation*, 224 F2d 414 (CA 3d Cir) (1955), cert den 350 US 971, 100 L ed 842, 76 S Ct 442 (1956), the clerk deliberately tried to place more than one Negro juror on each panel. To achieve that purpose, the cards of eligible jurors were marked to show those who were Negro. The court pointed out that, unlike *Avery*, which was a case of exclusion, the inclusion of Negroes on the jury was designed "to insure a fair representation" of that class, and was, therefore, proper. *Dow v. Carnegie-Illinois Steel Corporation*, 224 F2d 414, supra, at pages 425-426. Accord: *United States v. Dennis*, 183 F2d 201, supra, at page 223; *United States v. Forest*, 118 F Supp 504 (ED Mo) (1954). If deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against, an accused. Equal protection of the laws is not denied, but assured. We hold, therefore, there was no error in the deliberate selection of a Negro to serve on the accused's court-martial.

**Headnote 18**

The decision of the board of review is affirmed."

The direct conflict between these two cases is clear and convincing evidence of the need for this Court

to grant the petition for a writ of certiorari in this case.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

BERNARD N. MARCANTEL,
District Attorney,
Thirty-First Judicial District,
State of Louisiana.

THOMAS W. McFERRIN,
Special Counsel.

JAMES E. PHILLIPS, JR.,
Special Counsel,
Of Counsel.

## CERTIFICATE OF COUNSEL

I, Jack P. F. Gremillion, a member of the Bar of the United States Supreme Court, Attorney for H. L. Hanchey, Warden of the Louisiana State Penitentiary, do hereby certify that the foregoing supplement to petition for a Writ of Certiorari in this cause of in good faith and not merely for purpose of delay. I further certify that a copy of same has this day been forwarded to Stephen P. Coco and Herschel N. Knight, attorneys for respondent, Jennings, Louisiana.

Baton Rouge, Louisiana, this _____ day of October, 1964.

JACK P. F. GREMILLION,
Attorney General.